STATE OF MICHIGAN

COURT OF APPEALS

KONRAD D. KOHL,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

DAVIS LANE INVESTMENT COMPANY, SECREST, WARDLE, LYNCH, HAMPTON, TRUEX, & MORLEY, P.C., JOHN R. SECREST, ROGER F. WARDLE, TERRANCE M. LYNCH, GEORGE F. CLARK, and WILLIAM P. HAMPTON, Jointly and Severally,

Defendants/Counterplaintiffs-Appellees/Cross-Appellants.

UNPUBLISHED
December 27, 2002

No. 231189
Oakland Circuit Court
LC No. 99-017159-CK

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We reverse and remand.

I. Basic Facts and Procedural History

Plaintiff and the five individual defendants were senior shareholders in the law firm of Kohl, Secrest, Wardle, Lynch, Clark, & Hampton. In 1980, these individuals decided to build their own office building and a partnership, defendant Davis Lane Investment Company, was created to purchase, build, and manage the property. Upon its completion, the building constructed by Davis Lane was leased to the law firm as well as several smaller business entities.

In 1992, after forty-two years with the law firm, plaintiff entered a five-year buyout program for purposes of retirement. Upon completion of the buyout in 1997, plaintiff had no further involvement in the law firm, and his name was removed from the letterhead of the firm, which is now known as defendant Secrest, Wardle, Lynch, Truex and Morley, P.C (hereinafter "the law firm"). Plaintiff, however, retained his interest in the Davis Lane partnership, which continued to lease its property to the law firm.

In June 1995 the building constructed by Davis Lane became subject to foreclosure when the partnership failed to make a $3.5 million dollar balloon payment on the mortgage secured by the property. In an effort to avoid foreclosure, Davis Lane sought to refinance the property through a mortgage obtained through a new lender, Aid Association for Lutherans (AAL). As a condition to refinancing, AAL required that Davis Lane renegotiate its lease with the law firm. Because the Davis Lane partners' were unwilling to personally guarantee the mortgage, AAL further required that this new lease require the law firm to lease 45,000 square feet at $15.50 per square foot. In light of the law firm's assessment that it needed only 30,000 square feet of office space, the law firm shareholders who were not partners in the Davis Lane partnership initially balked at the new lease requirements, prompting the managing partners of Davis Lane to orally agree to provide the law firm with yearly rental rebates. As a result of this oral agreement, Davis Lane, over objection by plaintiff, provided rebates to the law firm of $120,000 in each of the years 1997, 1998, and 1999. Once returned to the law firm, the rebates were distributed as compensation among the law firm's shareholders.

Plaintiff filed the instant suit seeking an order declaring the rental rebates invalid. Plaintiff further sought compensatory damages for lost profits and breach of fiduciary duty, as well as treble damages for conversion.[1] Finding the rental rebates to be both permissible under the Davis Lane Partnership Agreement and justified under the circumstances, the trial court dismissed plaintiff's claims on defendants' motion for summary disposition. This appeal followed.

II. Propriety of the Oral Rent Rebate Agreement

Plaintiff first argues that the trial court erred in finding the oral rent rebate agreement to be valid under both the Uniform Partnership Act (UPA), MCL 449.1 *et seq*., and the terms of the Davis Lane partnership agreement.

We review a trial court's decision on a motion for summary disposition de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). "When reviewing a motion granted under MCR 2.116(C)(10), we must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ." *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 407; 622 NW2d 533 (2000). Proper application of statutory provisions and the interpretation of clear contract language likewise present questions of law subject to review de novo on appeal. *Miller v Mercy Memorial Hospital Corp*, 466 Mich 196, 201; 644 NW2d 730 (2002); *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995).

It is a well-established principle that, unless otherwise agreed between the partners, majority rule governs management of the ordinary matters of a partnership. *Nogueras v Maisel & Associates of Michigan*, 142 Mich App 71, 85; 369 NW2d 492 (1985). "However, [under the

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[1] Since the filing of this appeal, the parties have stipulated to dismissal of plaintiff's claim for conversion. Accordingly, we do not address the propriety of the trial court's grant of summary disposition on that claim.

UPA] an act in contravention of any agreement between the partners may not be done rightfully without the consent of all the partners." MCL 449.18(h).

We conclude, after review of the management and business purpose provisions of the Davis Lane partnership agreement, that the express language of the partnership agreement provides the managing partners with broad powers regarding the affairs of the partnership. Specifically, the only restrictions on the managing partners' authority to act on behalf of the Davis Lane partnership are contained in Section 11(a), which requires the managing partners' decisions to be unanimous, and Section 11(b), which requires a specific majority to decide issues related to disposal of the Davis Lane property. Accordingly, we conclude that the trial court correctly found that under the plain language of the Davis Lane partnership agreement the managing partners have sole decision-making authority to negotiate, as an ordinary matter within the business purpose of the partnership, the written terms of the lease agreement regarding the amount of rent the law firm should pay to Davis Lane. However, we further conclude that, to the extent that the oral rent rebate agreement may be viewed as a redistribution of profits in contravention of the partnership agreement, disputed issues of material fact precluding summary disposition exist, and that the trial court, therefore, erred in granting defendants' summary disposition.

Plaintiff presented below the sworn affidavit of certified public accountant Douglas Sophiea, who averred that the rent rebates were disbursed from Davis Lane profits. Plaintiff also submitted the statements of operations and corresponding balance sheets for the calendar years 1997, 1998, and 1999. A review of the statement of operations for the period ending December 31, 1997, indicates that the Davis Lane partnership accounted for the full rent rebate in the final quarter of that calendar year. In contrast, the statement of operations for the periods ending December 31, 1998, and December 31, 1999, do not show an expense account for the rent rebate. Additionally, the year-to-date sections of the statement of operations for the periods ending December 31, 1998, and December 31, 1999, do not reflect an apportionment of the rent rebate. Under generally accepted accounting principles, proper accrual accounting methods would have accounted for the expense even before year-end adjustments.

Section 12 of the partnership agreement requires Davis Lane to keep accurate financial records. Moreover, with respect to profits and losses, the parties do not dispute that under the terms of the Davis Lane partnership agreement each partner is entitled to an equal one-sixth share of all profits enjoyed by the partnership. Thus, under MCL 449.18(h), any other distribution of partnership profits requires the unanimous consent of all Davis Lane partners. Defendants argue that, but for AAL's requirement that the rebate be paid after payment of the mortgage and various expenses, defendants would not have included the rent rebate in Davis Lane's income. We note, however, that this argument is inconsistent with Davis Lane's treatment of the rent rebate as an expense in the financial statements for the period ending December 31, 1997, as well as its obligations under the partnership agreement to keep accurate financial records and to share profits equally. Given these inconsistencies, we conclude that a genuine issue of material fact concerning whether the rent rebates were an improper redistribution of partnership profits in contravention of the partnership agreement exists. Accordingly, summary disposition under MCR 2.116(C)(10) was improper.

We further conclude that a genuine issue of material fact precluding summary disposition exists concerning the validity of the oral rent rebate agreement. Regardless whether Davis Lane

and the law firm mutually consented to the rent rebate, the mortgage agreement with AAL prohibited any modifications to the lease agreement without the approval of AAL. Further, plaintiff submitted evidence in the form of a letter from the building's property manager, Robert Stillings, indicating that while AAL could not direct Davis Lane as to what to do with its "excess funds," it would "not allow a modification of the lease agreement in any manner that [would] reflect a reduction in rent from the tenant." While defendants relied on this same letter as support for AAL's approval of the rent rebate agreement, when deciding a motion for summary disposition a court must view the evidence and all reasonable inferences drawn therefrom in favor of the nonmoving party. *Progressive Timberlands*, *supra*. Viewing the evidence in plaintiff's favor, we conclude that a disputed issue of material fact exists as to whether the oral rent rebate agreement was proper in light of Davis Lane's mortgage agreement with AAL. Accordingly, the trial court improperly granted defendants' motions for summary disposition. *Hazle*, *supra*.

III. Breach of Fiduciary Duty

Plaintiff next argues that the trial court erred by dismissing his claim for breach of fiduciary duty. Again, we agree. Whether to recognize a cause of action for breach of fiduciary duty in a particular context is a question of law subject to review de novo on appeal. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 574; 603 NW2d 816 (1999). The fiduciary relationship between partners "impose[s] on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs." *Band v Livonia Associates*, 176 Mich App 95, 113; 439 NW2d 285 (1989). "Partners shall render on demand true and full information of all things affecting the partnership to any partner . . . ." MCL 449.20. This legislation "has been broadly interpreted as imposing a duty to disclose all known information that is significant and material to the affairs or property of the partnership." *Band*, *supra*. Additionally, "[e]very partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property." MCL 449.21(1). Relief from the conduct of a fiduciary may be granted when the position of influence has been acquired and abused, or when confidence has been reposed and betrayed. *Teadt*, *supra* at 580-581.

Our review of the record reveals that plaintiff presented sufficient evidence in support of his breach of fiduciary duty claim and that such evidence created disputed issues of material fact upon which reasonable minds could differ. Viewing the evidence in a light most favorable to plaintiff, the evidence indicates that (1) the partnership agreement unambiguously provides that the partners will share profits and losses equally, (2) for the years 1997, 1998, and 1999, the partnership had profits of $147,658, $258,572, and $276,447, respectively, for a total of $682,677, but plaintiff received a total of only $79,550, as reflected in the partnership's statements of operations for the periods ending on December 31, 1997, December 31, 1998, and December 31, 1999, (3) Davis Lane did not account for the rent rebate as an expense in the statement of operations for the periods ending December 31, 1998, and December 31, 1999, (4) that as a result of the rent rebate, Davis Lane partners who were also shareholders in the law firm received total distributions that either exceeded or equaled the amount that plaintiff received, and (5) a conflict of interest existed for Davis Lane shareholders who were also law firm shareholders. Plaintiff presented sufficient evidence to create a genuine issue of material fact

regarding whether he sustained actual money damages as a result of actions by the individual defendants that violated their fiduciary duty to plaintiff as a fellow partner. Plaintiff's claimed lost profits were ascertainable to a reasonable degree of certainty and not solely based on conjecture and speculation. *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511-513; 421 NW2d 213 (1988). Given these facts, we find that the trial court improperly granted defendants' motion for summary disposition of plaintiff's breach of fiduciary duty claim because a disputed issues of material fact exist regarding whether the rent rebate was an economic necessity and a legitimate expense of the partnership. *Band*, *supra*.

IV. Plaintiff's Compensatory Damages

Plaintiff next argues that the trial court erred in determining that plaintiff has received full compensation in that (1) he has already received more than his proportionate share of Davis Lane's profits after defendants attempted to mollify him with an initial larger percentage of the partnership's profits, and (2) he benefited from the rent rebate by virtue of his buyout agreement from the law firm, in that he received $3,500 from the rent rebate in 1997. "[T]he purpose of compensatory damages is to make the injured party whole for the losses actually suffered, the amount of recovery for such damages is inherently limited by the amount of the loss; the party may not make a profit or obtain more than one recovery." *McAuley v General Motors Corp*, 457 Mich 513, 520; 578 NW2d 282 (1998). As previously noted, plaintiff presented sufficient evidence to create a disputed issue of material fact regarding whether the rent rebate was a disbursement of Davis Lane profits in light of the conflicting financial information provided to the trial court. Determination of that issue is necessary to calculate whether plaintiff is entitled to damages. Accordingly, the trial court erred in determining that plaintiff has received full compensation for any damages he may have incurred.

V. Defendants' Cross-Appeal

On cross-appeal, defendants argue that the trial court improperly concluded that plaintiff was not required to repay the "excess" payments he received as a deterrent from proceeding with litigation. We agree. We have previously concluded that the trial court erred in granting defendants' motion for summary disposition because a disputed issue of material fact exists regarding whether the rent rebate was a legitimate expense of the partnership or an improper redistribution of profits. Upon proper determination of that issue, plaintiff's "excess" payments may properly be considered an offset against damages he may have suffered. Alternatively, if the rent rebate was a legitimate partnership expense, the trial court should consider whether plaintiff has any legitimate claim to those payments. In any event, considering our reversal of the order of summary disposition generally, this issue was prematurely decided against defendants.

We reverse and remand. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra